89-1919

No. _____ (1)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HARVEY JOHNPOLL,

Petitioner,

—against—

DICK THORNBURGH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment is violated when the Bureau of Prisons, without authorization from the Attorney General, collects money from a prison inmate to pay third party civil judgments?

2. Whether the Inmate Financial Responsibility Program, as propagated by the Bureau of Prisons, is unconstitutional because it is not reasonably related to any legitimate penological interest?

LIST OF PARTIES

The parties before this court are petitioner Harvey Johnpoll and respondent Dick Thornburgh, Attorney General of the United States.

In the proceedings below, the Second Circuit Court of Appeals, pursuant to Federal Rule of Appellate Procedure 43(c)(1), substituted Dick Thornburgh's name for that of former Attorney General Edwin Meese, Jr.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Harvey Johnpoll ("Johnpoll") respectfully prays for a Writ of Certiorari to review the dismissal by the United States Court of Appeals for the Second Circuit, entered March 6, 1990, of his motion for a preliminary injunction which would prevent prison officials from unlawfully and unconstitutionally collecting fines under *Program Statement 5380.1*, issued by the Federal Bureau of Prisons ("BOP").

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit, affirming judgment of the United States District Court for the Northern District of New York, is listed at 898 F.2d 849 and is reprinted at Appendix A. The Order of the District Court for the Northern District of New York, 87-CV-522 (October 15, 1987), denying Johnpoll's petition for a show cause order seeking declaratory and preliminary injunctive relief, including a stay of collection procedures under the

Inmate Financial Responsibility Program (IFRP), 28 C.F.R. §§ 545.10-11 (1989), is not reported and is reprinted at Appendix B.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit, affirming the District Court's denial of Johnpoll's motion, was entered on March 6, 1990. This Court has jurisdiction to review the judgment below by Writ of Certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person . . . shall . . . be deprived of life, liberty, or property, without due process of law. . . .

STATEMENT OF THE CASE

Effective April 1, 1987, the Federal Bureau of Prisons commenced a program entitled Inmate Financial Responsibility Program ("IFRP" or "Program"). The purpose of this Program, which is reprinted at Appendix C, is to "encourage[ ] each sentenced inmate to satisfy his legitimate financial obligations." 28 C.F.R. § 545.10.

Under the Program as proposed, inmates who choose to participate may be assigned to certain choice jobs in return for the repayment of court-ordered obligations or debts owed the federal government. 28 C.F.R. § 545.11(a). Depending on their job assignment, inmates are required to pay either $25 per month, or not less than 50% of their monthly pay. Fed-

eral Bureau of Prisons, *Program Statement 5380.1*.[1] Inmates with work assignments and compensation provided by Federal Prison Industries, Inc. (commonly known as "UNICOR," *see* 28 C.F.R. § 345.10 et seq.) who fail to demonstrate financial responsibility by meeting these obligations can be removed from their UNICOR jobs or be paid at only a maintenance level. See 28 C.F.R. § 545.11(c). Moreover, inmates who refuse to participate may have such refusal considered as a factor by prison authorities in determining whether any inmate may be given certain privileges "such as furloughs, half-way house placement, and preferred housing,"[2] and parole.[3] Presently, the BOP is attempting to enforce a third party civil judgment entered by Merrill Lynch against Johnpoll[4] even though Johnpoll has refused to participate in Program Statement 5380.1.

THE LOWER COURT DECISIONS

The standard for reviewing the lower courts' denial of Johnpoll's preliminary judgment is abuse of discretion. Abuse of discretion can be an error of law, an error of fact,

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1 Program Statement 5380.1 was published as a Proposed Rule in 54 Fed. Reg. 51, at 11332 (March 17, 1989) (to be codified at 28 C.F.R. 545.11) to remedy the BOP's earlier failure to comply with the administrative rule-making procedures mandated by The Administrative Procedure Act, 5 U.S.C. 553. See *Prows v. Dep't of Justice*, 704 F. Supp. 272, 276-7 (D.D.C. 1988).

To the extent that 28 C.F.R. § 545.11(c) overlaps with and includes portions of *Program Statement 5380.1*, Johnpoll's claims are equally applicable to § 545.11(c), as are his arguments raised in this Writ.

2 *Gardner v. Garrison*, No. 3-86-1923-G (N.D. Tex., November 14, 1986).

3 *Program Statement 5380.1* at 2 ("It is also important that inmates be aware that the United States Parole Commission will review the progress of their financial plans at parole hearings, and that satisfaction of court-ordered financial obligations will be made a condition of parole/mandatory release.")

4 See the Record below, Joint Appendix at A14, A50-51.

or an error in the substance or form of the trial court's order. *See e.g., Coca Cola Co. v. Tropicana Prods. Inc.*, 690 F.2d 312, 315 (2d Cir. 1982). In this instance, both of the lower courts committed an error of law by not recognizing the constitutional violations Johnpoll is currently being exposed to, and by not granting his motion for a preliminary injunction.

In addition, because Johnpoll challenges the constitutionality of a regulation, he is exempt from administrative exhaustion requirements. *Mathews v. Diaz*, 426 U.S. 67, 76 (1976); *Weinberger v. Salfi*, 422 U.S. 749 (1975) (no exhaustion required where constitutionality of administrative process used by agency is challenged). Thus, as Johnpoll's constitutional challenges, discussed in Points I and II below, are likely to succeed on the merits, this will meet the lower courts' holding that Johnpoll failed to exhaust his administrative remedies, and that he satisfy the standard for a preliminary injunction.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS' DECISION EFFECTIVELY DENIES PETITIONER HIS DUE PROCESS RIGHTS BY SANCTIONING THE BOP TO ACT AS A COLLECTION AGENT OF THIRD PARTY CIVIL JUDGMENTS.

Johnpoll has alleged that his due process rights have been violated by the institution of the IFRP collection program by the Bureau of Prisons, because the absence of any authority delegated by the Attorney General prohibits the BOP from collecting judgments, fines, penalties, and forfeitures. In his Amended Complaint, Johnpoll alleged "that this get tough and get the money anyway and every possible policy is [not] fully endorsed by the Attorney General . . . ," and, in addition, that the BOP has illegally assumed the role as the country's debt collector by attempting to collect not only fines and other obligations related to the terms of imprisonment, but also all judgments arising from any service whatsoever.

In his Application, Johnpoll asked the court to "adjudge and declare that the Bureau of Prisons is not the collection agency for any branch of this country's government."[5]

The only legitimate authority for the collection of fines is the Attorney General, pursuant to 18 U.S.C. § 3612(c).[6] There exists a Congressional grant of authority to delegate any function of the Attorney General's office to "any officer, employer, or agency for the Department of Justice," 28 U.S.C. § 510. Thus, the Attorney General has expressly empowered the Assistant Attorney General and the United States Attorney to collect judgments, fines, penalties and forfeitures. 28 C.F.R. § 0.171 (a) and (b).[7] Neither Congress nor the Attorney General has, however, granted such authority to the BOP.

The failure of the BOP to comply with this delegation of authority provision clearly violates the Department of Justice's own regulation, and denies inmates such as Johnpoll adequate notice that the BOP has usurped a power not otherwise granted to it. Accordingly, because the Attorney General or any other appointed official's authority is limited to collecting fines "arising in connection with cases under his juris-

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5 These citations are contained in the Record below, Joint Appendix at A59, A118-19.

6 This Section provides in pertinent part:

(c) Responsibility for collection.—The Attorney General shall be responsible for collection of unpaid fines concerning which a certification has been issued as provided in subsection (b).

7 The regulation states:

(a) Each Assistant Attorney General shall be responsible for the conducting, handling, or supervising of such litigation or other actions as may be appropriate to accomplish the satisfaction, collection, or recovery, as the case may be, or judgments, fines, penalties, and forfeitures . . . arising in connection with cases under his jurisdiction. In order to assure the efficient and effective performance of each of those functions described in the first sentence of this paragraph, each Assistant Attorney General shall designate an individual or unit in his division to be responsible for the performance of those functions.

diction," 28 C.F.R. § 0.171(a), the Bureau of Prisons has exercised its power so broadly as to deny due process. *See Accardi v. Shaughnessy*, 347 U.S. 260 (1954) (Court reversed the I.N.S. Board's determination on deportation because the Board failed to follow its own regulations; *see also Service v. Dulles*, 354 U.S. 363 (1957); *United States v. Leahey*, 434 F.2d 7 (1st Cir. 1970) (holding that the I.R.S. had failed to follow its own guidelines). This failure of an agency to follow its own regulations itself causes unjust discrimination and denies the public adequate notice in violation of due process. For example, in *N.L.R.B. v. Welcom-American Fertilizer Co.*, 443 F.2d 19, 20 (9th Cir. 1971), the Ninth Circuit held:

> When administrative bodies promulgate rules or regulations to serve as guidelines, these guidelines should be followed. Failure to follow such guidelines tends to cause unjust discrimination and deny adequate notice contrary to fundamental concepts of fair play and due process.

See Feliciano v. Laird, 426 F.2d 424, 429 (2d Cir. 1970) (army bound to follow regulations). There is, therefore, no basis in law for the BOP to collect any fines or court-ordered obligations, and the attempt by the BOP to do so constitutes a violation of Johnpoll's due process rights.

Moreover, even assuming, *arguendo*, such authority was delegated to the BOP, it could not be extended to enforcing civil judgments of third parties, for this extends even beyond the power of the Attorney General. As discussed in Point II below, the collection program—especially as it relates to civil judgments—is not reasonably related to any legitimate penological interest. Thus, in this situation the BOP is exceeding its powers and violating Johnpoll's due process rights.

The Second Circuit, the district court, and respondents have not pointed to any authority to support their proposi-

tion that the BOP has such collection authority.[8] Indeed, there exists no case law which supports the position taken by the respondent. The Second Circuit Court of Appeals perfunctorily stated, without citation, that "the Bureau of Prisons has not exceeded its statutory authority, nor departed from its own regulations, by administering a program to collect court-ordered civil judgments or fines." *Johnpoll v. Thornburgh*, 898 F.2d 849, 851 (1990). This is simply wrong. To be sure, as shown in Point III below, the BOP regulates inmates' behavior so as to achieve such goals as prison security and inmate rehabilitation. But no basis in law exists to justify the BOP's collecting any fines or court-ordered obligations—especially with respect to civil judgments and third party debts. In the present case, Johnpoll has a civil judgment entered by Merrill Lynch for $10,000,000.00 that the BOP is attempting to enforce. Because this judgment in no way relates to any aspect of his imprisonment, the BOP's attempt to collect this third party judgment further denies Johnpoll of his due process rights.

In short, the BOP has never been granted the authority to collect third party civil judgments—nor could it be—and any such enforcement effort denies Johnpoll his constitutional rights. A preliminary injunction should be granted to protect him.

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8 One court recently concluded that, as a general matter, the BOP has authority to enact the IFRP. *Prows v. U.S. Dep't of Justice*, 704 F. Supp. 272 (D.D.C. 1988). The *Prows* court did not consider the IFRP specifically in conjunction with Program Statement 5380.1—that is, whether collecting civil judgments of third parties is "reasonably related" to a legitimate penological interest. Moreover, the issue of whether or not the BOP has the authority from the Attorney General to collect such judgments was not raised before that court. Finally, the court held that Program Statement 5380.1 was not legitimately issued under administrative law procedures, and declared it as a substantive rule "null and void." *Id.*, at 276-77; see also *Cooper v. United States*, 856 F.2d 193 (6th Cir. 1988) (Table) (text in WESTLAW) (holding without explanation that the IFRP "is reasonably related to the legitimate goal of inmate rehabilitation").

II. IN ALL EVENTS, THE COLLECTION PROGRAM OF THE IFRP IS UNCONSTITUTIONAL BECAUSE IT IS NOT REASONABLY RELATED TO ANY LEGITIMATE PENOLOGICAL INTEREST.

In all events, the collection program of the IFRP is unconstitutional because it is not reasonably related to any legitimate penological interest. The United States Supreme Court has stated that in considering the validity of a prison regulation that deprives prisoners their rights, the Court must find the regulation to be "reasonably related to legitimate penological interest." *Turner v. Safley*, 482 U.S. 78, 89 (1987). The Court requires an inquiry into whether a particular prison regulation is reasonably related to legitimate penological objectives, or whether it represents an "exaggerated" response to those concerns. *Id.*, at 86 (1987). An analysis of the present situation reveals no reasonable connection between BOP 5380.1 and any valid rehabilitative goal and, further, that the Program impacts upon inmates such as Johnpoll so as to deny due process.

The *Turner v. Safely* decision is instructive. In *Turner*, this Court rejected the argument that a prohibition on women prisoners' right to marry would further the rather dubious rehabilitative objective of fostering independence. In the present case, the Court once again faces a rehabilitative objective which supposedly fosters independence—this time, "financial"—that is in reality wholly dubious. In its attempt to foster an inmate's "financial responsibility" by repaying debts, the BOP "sweeps much too broadly than can be explained by . . . penological objectives." *Id.* at 98.

The present case in fact provides an even clearer reason to strike down the regulation than that discussed in *Turner*. While in *Turner* the Court had before it some factual basis for the "articulated rehabilitation goal," *id.* at 98, there exists no such factual record developed or "articulated" in the present case. Respondent has described the IFRP as "the mechanism devised by the Bureau of Prisons to encourage inmates' rehabilitation . . ." and thus "reasonably related to

a legitimate penological interest," namely rehabilitation. Like *Turner*, both the goal and the means of obtaining that goal are spurious and thus deserve this Court's scrutiny.

This Court should strip away the rehabilitative gloss applied by the BOP in justifying its Program, for there exists no logical connection between the Program and any valid rehabilitative goal. The Program, while impinging an undeniably strong interest in wages, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969) ("wages [are] a specialized type of property"), does not serve the so-called rehabilitative goal of fostering responsibility to assume one's debts. Rather, the Program acts as a disguised debt collection mechanism devoid of any rehabilitative goal.

Indeed, Johnpoll has alleged that Program Statement 5380.1 as executed does not permit an inmate to refuse or avoid the program. On one hand, the Program Statement is silent as to how any inmate can refuse to enter. On the other hand, the Program Statement expressly discusses the "failure to comply." The inescapable inference is that every inmate must participate. Once compelled to join, the inmate is forced to risk every facet of prison privileges, *e.g.*, parole, work programs, furloughs. If for some reason he drops out of the Program or even receives the slightest demerit, his prison record is forever blemished.

By this coerced participation in the collection program, the inmate is required to recognize—in effect, legitimize—all of the court-ordered obligations. These include any civil judgments third parties have taken against the inmate which are wholly unrelated to his conviction or sentence, such as fines or costs. In this instance, a $10,000,000.00 judgment on behalf of Merrill Lynch is a judgment which Johnpoll is forced to recognize by virtue of the Program. Further, he is punished under the Program for failing to pay this third party debt. Such a program, under these facts, is unconstitutional, particularly so when the government or the BOP seeks to enforce collection against indigent defendants. *See United States v. Atkinson*, 288 F.2d 900, 903-4 (2d Cir. 1986)

("[T]he factor of indigency would take on great improtence [sic] at the time any attempt was made to revoke probation or parole for non-compliance with the restitution order."); *United States v. Hutchings*, 757 F.2d 11, 14-15 (2d Cir. 1985); *see also United States v. Rivera-Velez*, 839 F.2d 8 (1st Cir. 1988).

This program not only sweeps too broadly, but also has the direct opposite effect of that which it seeks to encourage, thereby rendering it unrelated to achieving any rehabilitative goal. Because Johnpoll has refused to participate in what he believes is an unconstitutional program,[9] he is unable to generate any income of his own. Prison authorities nevertheless have incessantly demanded some form of payment from Johnpoll, who has alleged that prison official used force, threats, and other forms of intimidation and harassment to collect payment.[10] As a result, Johnpoll must place additional financial burden upon those for whom he remains responsible. Thus the IFRP, instead of fostering independence, causes Johnpoll to become even more indebted to those on whose assistance he now relies. And, the BOP has armed prison officials with discretionary powers that can, and do, become abused.

As demonstrated above, no penological reason exists for the collection of third party civil judgments. Therefore, a preliminary injunction should be granted.

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9 The Court of Appeals admitted that the fact that Johnpoll "was not even enlisted in the IFRP program . . . strengthens his claim to deprivation of due process by prison officials' attempt to collect fines with no apparent basis." *Johnpoll v. Thornburgh*, 898 F.2d 849, 851 n.2. Not only does this distinguish Johnpoll's case from that of *James v. Quinlan*, 866 F.2d 627 (3d Cir. 1989), but it also in turn strengthens Johnpoll's claim that he need not exhaust his administrative remedies. See *infra* p. 4. Of course, Johnpoll has standing to raise such claims as he has paid $25.00 into the Program. See the Record below, Joint Appendix at A104.

10 It should be noted that Johnpoll "alleged coercive tactics used to collect fines" by prison officials. *Johnpoll v. Thornburgh*, 898 F.2d 849, 851.

CONCLUSION

For the foregoing reasons, we respectfully request that a Writ of Certiorari be issued to the United States Court of Appeals for the Second Circuit.

Dated: June 4, 1990

Respectfully submitted,

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APPENDICES

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 567, 568—August Term, 1989

(Argued December 18, 1989 Decided March 6, 1990)

Docket Nos. 88-2131, -3019

HARVEY JOHNPOLL,

Appellant,

—v.—

DICK THORNBURGH,* Attorney General of the United States,

Appellee.

Before:

OAKES, *Chief Judge*, PRATT, *Circuit Judge*, and SAND, *District Judge*.**

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* Pursuant to Federal Rule of Appellate Procedure 43(c)(1), Attorney General Dick Thornburgh's name has been substituted for that of former Attorney General Edwin Meese, Jr.

** Of the United States District Court for the Southern District of New York, sitting by designation.

Appeal from a judgment of the United States District Court for the Northern District of New York, Thomas J. McAvoy, *Judge*, denying federal prisoner's motion for class certification and for declaratory and preliminary injunctive relief due to failure to exhaust administrative remedies.

Affirmed.

IAIN A. W. NASATIR, Kaye, Scholer, Fierman, Hays & Handler, New York, NY, *for Appellant*.

WILLIAM C. PERICAK, Assistant United States Attorney (Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York; David R. Homer, Assistant United States Attorney; Patricia H. Jordan, J.D., Paralegal Specialist, of counsel), *for Appellees*.

PER CURIAM:

Harvey Johnpoll appeals from an order dated January 30, 1988, of the United States District Court for the Northern District of New York, Thomas J. McAvoy, Judge, denying his petition for a show cause order seeking declaratory and preliminary injunctive relief, including a stay of collection procedures under the Inmate Responsibility Program (IFRP), 28 C.F.R. §§ 545.10-

545.11 (1989), and denying his motion for class certification. We affirm.

The Bureau of Prisons has established administrative remedy procedures by which a federal inmate may seek formal review of a complaint which "relates to any aspect of his imprisonment." *See* 28 C.F.R. § 542.10 (1989). These procedures are subject to strict time limits to prevent undue delay. *See* 28 C.F.R. §§ 542.13-542.15 (1989).

Johnpoll has not attempted to pursue administrative remedies, but contends that prison officials' collection of civil judgments (such as rent owing to a landlord) under the IFRP does not "relate[ ] to any aspect of his imprisonment," and thus that grievances relating to the program are not generally required by federal regulations to be submitted to administrative remedy procedures. We do not agree. Although the IFRP covers obligations beyond that owed as restitution for crimes, *see* 28 C.F.R. § 545.11, it serves a valid penological objective of rehabilitation by facilitating repayment of debts. *See James v. Quinlan*, 866 F.2d 627, 630 (3d Cir.), *cert. denied*, 110 S. Ct. 197 (1989).

Johnpoll has not adequately alleged that preconceived biases of prison officials have rendered the administrative grievance process futile. The bare assertion in his complaint as to animosity by one case unit manager is not sufficient to show futility of the entire administrative process, especially since he has since been transferred to another institution.

Nor can we agree with Johnpoll's blanket assertion that constitutional claims are exempt from the administrative exhaustion requirement. A federal prisoner alleg-

ing constitutional claims as a basis for injunctive relief is not generally exempt from exhausting federal administrative remedies. *See Lyons v. U.S. Marshals*, 840 F.2d 202, 204 (3d Cir. 1988); *Miller v. Stanmore*, 636 F.2d 986, 991 n.5 (5th Cir. Unit A Feb. 1981); *Simmat v. Smith*, 602 F. Supp. 18, 20 (S.D.N.Y. 1984), *aff'd*, 779 F.2d 38 (2d cir. 1985).[1] This is not to say, however, that a federal prisoner must exhaust administrative remedies if administrative procedures are either not reasonably available or otherwise inadequate. *See J.G. v. Board of Educ.*, 830 F.2d 444, 447 (2d Cir. 1987). Because administrative remedies are available to Johnpoll, his constitutional claims are not exempt from administrative exhaustion requirements, except to the extent that the administrative procedures are incompetent to provide redress, for example, to redress a challenge to the constitutional validity of a statute or regulation. *See Finnerty v. Cowen*, 508 F.2d 979, 981-83 (2d Cir. 1974) (no exhaustion required where plaintiff challenges constitutionality of administrative process used by agency).

Johnpoll's first constitutional claim, based on alleged coercive tactics used to collect fines, challenges the practice of prison officials rather than the policy under which they are acting, and is therefore redressable by prison officials. The constitutional exception to the exhaustion requirement does not permit a federal inmate to bypass administrative procedures for any alleged unfair practice of prison officials simply by converting

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1 Although a state prisoner alleging claims under 42 U.S.C. § 1983 (1982) need not exhaust state administrative remedies, *see Patsy v. Board of Regents*, 457 U.S. 496 (1982), we feel *Patsy*'s exemption for section 1983 claims is not applicable here, because it depends in large part on the particular legislative history of section 1983, especially congressional mistrust of factfinding procedures of state institutions. *See id.* at 502-07.

his claim into a due process cause of action. Moreover, economic loss does not in and of itself generally constitute "irreparable injury" which might excuse requiring a plaintiff to exhaust administrative remedies and justify preliminary injunctive relief. *See Randolph-Sheppard Vendors of America v. Weinberger*, 795 F.2d 90, 108-09 (D.C. Cir. 1986).

Johnpoll's next two constitutional challenges, on the other hand, attack the constitutionality of the IFRP itself. Administrative authorities are not competent to address such claims, and no useful function would be served by administrative factfinding. Nevertheless, as discussed below, the likelihood of success on the merits of these claims is so slight as to make denial of preliminary injunctive relief appropriate.

Johnpoll's constitutional challenge to the authority of the Bureau of Prisons to collect moneys owing for civil judgments must fail, because the IFRP program serves valid penological interests and is fully consistent with the Bureau of Prisons' authorization, under the direction of the Attorney General, to provide for rehabilitation and reformation. *See Prows v. United States Dep't of Justice*, 704 F. Supp. 272, 274-75 (D.D.C. 1988). The Bureau of Prisons' collection of fines is not inconsistent with or preempted by the Attorney General's delegation to assistant attorneys general and United States attorneys of responsibility for collection of judgments and fines, *see* 28 C.F.R. § 0.171 (1989), because there is no reason to presume that this delegated power is exclusive. Therefore, the Bureau of Prisons has not exceeded its statutory authority, nor departed from its own regulations, by administering a program to collect court-ordered civil judgments or fines.

The third constitutional challenge is that not permitting Johnpoll to opt out of the IFRP is punitive in nature and therefore violates due process. Even though IFRP regulations may allow prison officials to require that all inmates with debts participate in the program, *see* 28 C.F.R. § 545.11, Johnpoll's compelled participation is not punitive because, as noted above, it was "reasonably related to a legitimate governmental objective" of rehabilitation. *See Bell v. Wolfish*, 441 U.S. 520, 539 (1979).[2]

Given the dim likelihood of success and the availability of administrative remedy procedures, we see no reason why the district court should have to hold an evidentiary hearing on Johnpoll's petition for an order to show cause.

Provided that the district court has applied the proper legal standards in deciding whether to certify a class, its decision may only be overturned if it constitutes an abuse of discretion. *See Adamson v. Bowen*, 855 F.2d 668, 675 (10th Cir. 1988). The district court did not abuse its discretion in finding that Johnpoll did not define the class he seeks to represent with sufficient particularity and that he did not demonstrate his ability to represent adequately the interests of the putative class. We suppose it well within the district court's discretion to consider a later class certification motion that defines the class with more particularity and demonstrates that

2 Johnpoll now asserts he was not even enlisted in the IFRP program. If this is so, it has two implications. First, it strengthens his claim to deprivation of due process by prison officials' attempt to collect fines with no apparent basis, but prison administrative procedures are competent to redress such a claim. Second, it means that Johnpoll has not been injured by administration of the IFRP; therefore, his second and third constitutional claims fail for lack of standing.

Johnpoll, now represented by counsel, might adequately represent the class.

The judgment of the district court is affirmed.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

87-CV-522

HARVEY JOHNPOLL,

Plaintiff,

vs.

EDWIN MEESE, JR., et al.,

Defendant.

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HON. THOMAS J. MCAVOY, D.J.

ORDER

The above matter comes to me following a Report-Recommendation by Magistrate Daniel Scanlon, Jr, duly filed on October 15, 1987. Following ten (10) days from the service thereof, the Clerk has sent me the entire file, including any and all objections filed by the parties herein.

After careful review of all of the papers herein, including the Magistrate's Report Recommendation and the objections submitted thereto, it is the opinion of this Court that the Magistrate correctly found that plaintiff has not shown that he meets the requirements of Fed. R. Civ. P. 23 in that he has not set forth with sufficient particularity the prisoners he refers to as "members of the class" as required in the governing case law. *See eg. Hendrix v. Faulkner*, 525 F. Supp. 435, 442 (N.D. Ind. 1981), *aff'd in part, vacated in part on other grounds*, 715 F.2d 269 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 3587 (1984). This Court would also agree that plaintiff is not now in a position to adequately represent the interests of a class, if one exists.

The Magistrate correctly found that plaintiff has failed to exhaust his administrative remedies and that a question exists as to the likelihood of success on the merits. It is therefore clear that plaintiff has failed to meet the requirements established by the Second Circuit to enable this Court to issue a temporary restraining order or preliminary injunction. See *United States v. State of New York*, 708 F.2d 92, 93 (2d Cir. 1983) (citing *Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc.*, 596 F.2d 70 (2d Cir. 1979); *see also Black v. Transport Workers Union of America, AFL-CIO*, 454 F. Supp. 813, 816 n.1 (S.D.N.Y.1978). It is therefore,

ORDERED that:

1. The Report-Recommendation is hereby approved; and

2. Plaintiff's motion for injunctive and declaratory relief and class certification be and hereby is denied.

Dated at Birmingham, New York
January 30, 1988

/s/ THOMAS J. MCAVOY
Thomas J. McAvoy
District Court Judge

U.S. DEPARTMENT OF JUSTICE
FEDERAL BUREAU OF PRISONS

	OPI	:	CORR
	Number	:	5380.1
PROGRAM	Date	:	March 27, 1987
STATEMENT	Subject	:	INMATE FINANCIAL RESPONSIBILITY PROGRAM

EFFECTIVE DATE: April 1, 1987

1. [*PURPOSE AND SCOPE § 545.10*: The Bureau of Prisons encourages each sentenced inmate to satisfy his legitimate financial obligations. As part of the initial classification process, Bureau staff will provide the inmate with the opportunity to develop a financial plan for satisfying these obligations. At subsequent program reviews, Bureau staff shall consider the inmate's efforts to meet these financial obligations as indicative of the inmate's acceptance of responsibility.]

2. *DIRECTIVES REFERENCED*:

P.S. 5100.2, *Security Designation and Custody Classification System.*
P.S. 5270.5, *Inmate Discipline and Special Housing Units.*
P.S. 5280.3, *Furloughs.*
P.S. 5290.5, *Admission and Orientation Program.*
P.S. 5321.3, *Unit Management Manual.*
P.S. 5322.6, *Classification and Program Review of Inmates.*
P.S. 5803.3, *Progress Reports.*
P.S. 5882.2, *Fines and Costs.*
P.S. 8000.1, *UNICOR Corporate Policies and Procedures Manual.*

3. *DISCUSSION*: The Victim and Witness Protection Act of 1982, the Criminal Fine Enforcement Act of 1984, and the Parole Commission's revised "Conditions of Release"

require a diligent effort to satisfy court-ordered financial obligations.

Many inmates have the resources to meet their financial obligations at the time they are committed, and others earn significant wages while working in UNICOR. A conscientious financial management program will allow an inmate to make contributions toward his financial obligations while developing a constructive sense of responsibility.

Excluded from the provisions of this Program Statement are pretrial detainees, study and observation cases, holdovers, and material witnesses.

4. [*PROCEDURES* § 545.11: Unit staff shall meet with each inmate with an identified financial obligation(s) to develop a plan for meeting the obligation(s) by using the inmate's outside resources or institution earnings for payment.

a. *Developing a Financial Plan*—At initial classification, the unit team will review an inmate's financial obligations. All documentation should be considered, including, but not limited to, the Pre-Sentence Report and the Judgment and Commitment Order(s). A financial plan shall be developed and documented and will include the following obligations, in priority order:

(1) Special assessments imposed under 18 U.S.C. 3013;

(2) Court-ordered restitution;

(3) Fines and court costs;]

The court may establish a payment schedule or a deferred payment date to satisfy an order of restitution or a fine. In cases where the dates of the court-ordered payment schedule follow the period of incarceration, the financial plan should address any other financial obligations, while encouraging a savings plan to help meet future obligations.

[(4) Judgments in favor of the United States;

(5) Other debts owed the federal government; and]

Debts owed the federal government may include student loans, Veterans Administration claims (e.g., home loan default, education benefit ovrpayment), tax liabilities, Freedom of Information and Privacy Act fees, etc.

[(6) Other court-ordered obligations.]

These include child support, alimony and *other judgments against the inmate.*

Together, the inmate and Unit Team will develop a financial plan for meeting these obligations, to the extent possible, with the inmate's outside resources and institution earnings. The lack of institution earnings does not exclude an inmate from developing a financial plan.

It is important that inmates be reminded that interest and penalties are associated with unpaid restitution and fines. It is also important that inmates be aware that the United States Parole Commission will review the progress of their financial plans at parole hearings, and that satisfaction of court-ordered financial obligations will be made a condition of parole/mandatory release.

The financial plan will be included in the staff summary and/or violator report prepared by the Case Manager within ten days after the Initial Classification meeting (see P.S. 5322.6, CN-2).

Inmates already classified at the time of implementation of this Program Statement are required to develop a financial plan at their next review. Subsequent progress reports will refer to the plan and the inmate's compliance.

[b. *Payment*: The inmate is responsible for making all payments required by the financial responsibility plan, and for providing documentation to staff. Payments may be made from earnings of the inmate within the institution or from outside resources.]

Payments may be made in three ways:

(1) Outside payments ordinarily are made by the inmate's family directly to the party to whom the obligation is to be paid.

(2) Single payments from commissary funds may be made, and ordinarily will be used to pay special assessments under 18 U.S.C. § 3013.

(3) Repetitive withdrawals will be initiated by unit staff, upon approval of the inmate, and processed by Financial Management staff. One withdrawal is to be made per month, no later than five (5) working days after posting the inmate payrolls.

Ordinarily, the minimum payments for non-Unicor and Unicor grade 5 inmates will be $25.00 per quarter. Inmates assigned grades 1 through 4 in UNICOR will be expected to allot not less than 50% of their monthly pay to the payment process. Allotments may exceed this percentage after considering the individual inmate's specific obligations and resources.

[c. *Monitoring*: An inmate's participation in the financial responsibility plan will be reviewed each time staff assess the inmate's demonstrated level of responsible behavior, including, but not limited to, when determining security/custody classification level, eligibility for community activities, good time status, housing assignments, and work assignments. Progress on the financial responsibility plan will be reported to the United States Parole Commission.

An inmate who fails to demonstrate financial responsibility may neither secure a UNICOR work assignment, nor receive performance pay above the maintenance pay level. An inmate already in a UNICOR work assignment or receiving performance pay who fails to make adequate progress on the financial plan will be considered for removal from UNICOR, or reduction to the maintenance pay level of performance pay.]

(1) *Progress Reports*: Reports on the status of an inmate's current financial plans are to be included in the inmate's progress reports in accordance with Bureau policy (see P.S. 5803.3). The inmate's financial status will be added to progress reports as item 18(i) under "Institutional Adjustment", and will be entitled, "Progress on Financial Plan". When a progress report is prepared for release purposes, this section will also contain a statement as to how the inmate will continue the financial plan after his release from the institution.

(2) *Institution Work Assignment*: Staff may give an inmate with significant financial needs or unsatisfied financial obligations priority placement in UNICOR to assist in meeting those obligations. However, within UNICOR, time-in-grade requirements will not be waived. There also may be instances where the Team believes that the inmate requires a program other than UNICOR despite financial obligations. This may be an educational or vocational training program. In this case, the inmate may be considered for part-time UNICOR work, or scheduled for a UNICOR assignment at a later date.

Institution needs for skilled craftsman will also be considered by the Unit Team. There will be occasions where the needs of the institution require an inmate to be assigned to a lower paying, non-UNICOR assignment. The Team will take this into consideration when developing the financial plan, and will review the status of the work assignment at future reviews.

(3) *Consideration*: In addition to the limitations placed on an inmate's trust fund account when committed fines are not paid (P.S. 5882.2), and in addition to the consideration to be given by the United States Parole Commission, an inmate's participation in Bureau of Prisons programs will, in part, depend upon the inmate's level of financial responsibility. An inmate's financial plan progress will be reviewed each time policy requires the

Team to determine the inmate's demonstrated level of responsible behavior. In reviewing an application for community activities, the Unit Team will consider institutional adjustment, program participation, work record, and the inmate's demonstrated level of responsibility. The financial responsibility plan is designed, to the extent possible, to help inmates demonstrate responsible behavior by meeting their financial obligations.

5. *INSTITUTION FINANCIAL RESPONSIBILITY PROGRAM COORDINATOR.* Each institution is required to have an institution Program Coordinator as selected by the Warden. The program coordinator is responsible for institution reporting requirements and for ensuring that the Financial Responsibility Program is explained to inmates during the Admission and Orientation Program.

6. *SENTRY REQUIREMENTS.* When the team determines that an inmate is participating in the Program, a CMA assignment of "FRP PART" will be entered. If the inmate refuses to participate in the program, an assignment of "FRP REFUSE" will be entered.

No entry will be made under the CMA category on inmates who do not have financial obligations.

When the inmate has a need to participate in the program but the Team determines that the inmate is unable to participate (e.g., medically unassigned with no community resources), a CMA assignment of "FRP EXEMPT" will be entered. (This assignment should rarely be used.)

After the inmate has met all the conditions of the Financial Agreement, the CMA "FRP PART", "FRP REFUSE", or "FRP EXEMPT" will be replaced by "FRP COMPLT".

In summary:

FRP PART = Participates in Program
FRP REFUSE = Refuses to Participate in Program
FRP EXEMPT = Unable to Participate in Program
FRP COMPLT = Has completed the Program.

7. *REPORTING REQUIREMENTS.* Unit staff are responsible for recordkeeping on individual inmates in the unit who are participating in the program. This accomplished through entries on the Inmate Chronological Financial Record List (Attachment A), which is placed in Section 4 of the Central File.

Unit Managers are responsible for reporting all verified payments made by unit inmates during each month. This information, which includes outside payments, single payments, and repetitive withdrawals will be logged on the Monthly Unit Payment Log (Attachment B). At the end of each month, this log will be submitted to the institution Financial Responsibility Program Coordinator.

By the 20th of each month, institution Coordinators will consolidate the logs from all the units for the previous month, enter this information on the Institution/Regional Financial Responsibility Report (Attachment C), and transmit the report via electronic mail to the Regional Correctional Programs Administrator. By the 25th of each month, Regional Office staff will consolidate and transmit this information for the previous month via electronic mail to the Correctional Programs Branch, Central Office.

8. *AUDITING RESPONSIBILITIES.* Regional Correctional Programs Administrators shall audit institutional compliance of this Program Statement as part of the annual audit.

9. *INSTITUTION SUPPLEMENT.* Each institution shall develop an Institution Supplement detailing procedures for implementing the provisions of this Program Statement. A copy of the Institution Supplement is to be sent to the appropriate Regional Correctional Programs Administrator.

/s/ NORMAN A. CARLSON
Norman A. Carlson
Director